Error to Circuit Court, Appomattox County.

Action by the administrator of the estate of W. H. Shiveley, deceased, against the Norfolk & Western Railway Company. From a verdict and judgment for defendant upon a second trial granted after sustaining a motion to set aside a verdict for plaintiff in the first trial, plaintiff brings error. Reversed.

S. L. Ferguson, of Appomattox, *F. C. Moon,* of Lynchburg, and *W. C. Franklin,* of Tulsa, Okl., for plaintiff in error.

F. S. Kirkpatrick, of Lynchburg, and *W. H. Mann,* of Petersburg, for defendant in error.

TRAUERMAN *v.* OLIVER'S ADM'R.

June 12, 1919.

[99 S. E. 647.]

1. **Municipal Corporations (§ 706 (8)*)—Automobile Accident—Instruction—Burden of Proof.**—In action against automobile driver for death of plaintiff's intestate while standing upon sidewalk, where court charged jury that plaintiff had burden of proving allegations of declaration, plaintiff held entitled, under the evidence, to instruction that, if automobile struck deceased while standing upon sidewalk, defendant driver had burden of showing that she was not negligent.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 256.]

2. **Municipal Corporations (§ 706 (8)*)—Use of Streets—Automobile Accident—Instruction.**—In action for death of plaintiff's intestate from automobile accident while standing upon sidewalk, requested instruction that, if deceased was struck while on sidewalk, defendant driver had burden of showing "by a preponderance of evidence that said killing was unavoidable," did not, by use of word "unavoidable," throw too great burden on defendant; it being apparent that only proof required was that she had done everything a reasonably prudent person would have done to avoid the injury.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 256.]

3. **Municipal Corporations (§ 706 (3)*)—Automobile Accident—Death of Man upon Sidewalk—Burden of Proof.**—Automobile driver, being sued for death of person struck by automobile while standing upon sidewalk, had burden of proving that she did everything an ordinarily reasonably prudent person would have done to avoid the injury.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 170.]

4. **New Trial (§ 39*)—Grounds—Refusal to Give Instruction.**—In action for death of plaintiff's intestate from being struck by au-

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

tomobile while standing on sidewalk, where court instructed jury that plaintiff had burden of proving allegations of declaration, and where there was evidence that intestate had been struck while standing on sidewalk, refusal to charge jury that, if intestate had been so struck, defendant driver had burden of proving herself not negligent, was ground for setting aside verdict for defendant.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 436.]

5. Trial (§ 253 (1)*)—Instructions—Ignoring Issues.—Instructions given for one party which ignore theory of other party are erroneous.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 724]

6. Municipal Corporations (§ 706 (8)*)—Use of Streets—Automobile Accident—Instruction.—In action against automobile driver for death of plaintiff's intestate while standing upon sidewalk, where defense was that accident was due to another automobile which had struck plaintiff's car, instruction as to plaintiff's right of recovery was not objectionable for failure to advise jury that defendant was not liable if death was due to intervening cause over which defendant had no control, where the instruction required defendant's negligence to be proximate cause, and court in other instructions explained proximate cause and intervening cause.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 258.]

7. Municipal Corporations (§ 706 (8)*)—Automobile Accident—Intervening Cause.—In action for death from automobile accident, claimed by defendant driver to have been caused by passing automobile striking defendant's car, instruction as to defendant's negligence held to have taken into consideration defense of intervening cause.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 377.]

8. Municipal Corporations (§ 706 (6)*)—Automobile Accident—Intervening Cause—Jury Question.—In action for death from automobile accident claimed by defendant to have been caused by another automobile striking defendant's car, whether the impact from the other automobile was sole proximate cause or whether defendant's negligence was a contributing cause held, under the evidence, for the jury.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 376; 17 Va.-W. Va. Enc. Dig. 759.]

9. Appeal and Error (§ 999 (1)*)—Review—Verdict.—Verdict of jury upon question fairly and correctly submitted to it is conclusive.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 423.]

10. Municipal Corporations (§ 706 (8)*)—Automobile Accident—Instruction—Evidence.—In action for death from automobile acci-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

dent, where defendant claimed a passing automobile had struck her automobile, causing the accident, evidence held to warrant instruction that defendant was negligent if there was a sufficient interval between impact with passing automobile and accident to enable defendant in exercise of ordinary care to stop her car.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 377.]

Error to Hustings Court of Richmond.

Action by James Oliver's administrator against Kate S. Trauerman. Judgment for plaintiff, and defendant brings error. Affirmed.

Williams & Mullen and *Smith & Gordon*, all of Richmond, for plaintiff in error.

Hundson Cary, of Richmond, for defendant in error.

McCOY *v.* COMMONWEALTH.

June 18, 1919.

[99 S. E. 644.]

1. Homicide (§ 300 (7)*)—Instruction—Self-Defense—Applicability to Evidence.—In a murder prosecution, where it was claimed that defendant was the aggressor, and the only provocation was angry words, instruction that bare fear, unaccompanied by overt acts, will not justify a killing in self-defense held supported by the evidence.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 158.]

2. Homicide (§ 300 (15)*)—Instructions—Self-Defense—Duty to Retreat.—In a prosecution for murder, an instruction that unless the assault is so fierce or of such a nature as to prevent it, the person assaulted should retreat so far as he reasonably can, so as to prevent his killing his adversary, was erroneous, as ignoring the distinction between justifiable and excusable homicide in self-defense.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 159.]

3. Criminal Law (§§ 422 (6), 1169 (7)*)—Declaration of Coindictee—Review—Harmless Error.—In a prosecution for murder, evidence that one jointly indicted with defendant ordered two boys immediately before the shooting to leave was irrelevant, but harmless, where defendant was in no way connected therewith, and was not shown to have heard the remarks nor to have acquiesced therein.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 78.]

4. Criminal Law (§ 719 (1)*)—Argument of Counsel.—In a prosecution for murder, a statement by the prosecuting attorney at the

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.